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ABSTRACT

The evolution in the way courts have labeled or categorized accrediting agencies is considered, along with the legal and policy consequences of this evolution. Attention is focused on the public interest standard that is the core of these developments and on ways in which accrediting agencies can fulfill their legal responsibilities under this standard. Accrediting agencies as governmental entities, quasi-governmental entities, quasi-public entities, and private or nonpublic entities are discussed. It is suggested that the quasi-public category of law best serves the process of accreditation. This category focuses attention on the public service aspects of included entities. The quasi-public category provides a set of variously defined standards to guide courts in reviewing decisions of accrediting agencies and to guide accrediting officials and public policymakers in fulfilling accreditation's responsibilities to the public. The category also establishes the goal to serve the public interest. Four concepts critical to accreditation's future are: autonomy, impartiality, expertise, and public representation. A list of court cases and a brief bibliography are appended. (SW)

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An Occasional Paper

Accrediting Agencies' Legal Responsibilities

In Pursuit of the Public Interest

William A. Kaplin

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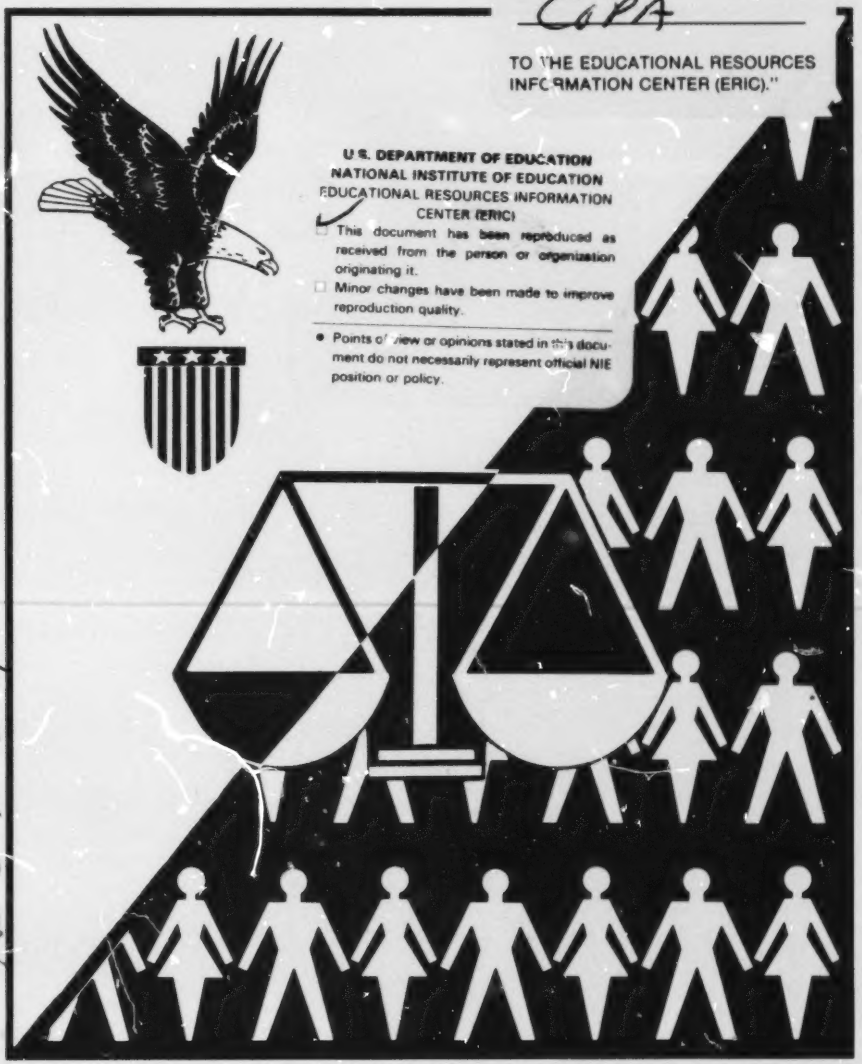

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The Council on Postsecondary Accreditation

An Occasional Paper

Accrediting Agencies' Legal Responsibilities
In Pursuit of the Public Interest

William A. Kaplin

The Council on Postsecondary Accreditation
One Dupont Circle, N.W.
Washington, D.C. 20036

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Foreword

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, COMPLAINT, Pan Coast University, Plaintiff v. Polyprofessional Accrediting Commission, Defendant . . . What accrediting agency, on receiving these words in a summons, would not take a deep, collective breath and begin reviewing, step-by-step its policies and procedures as they were applied, in the spirit of collegial self-regulation, to the aggrieved institution.

In a bygone era, counsel could point to the agency's status as a private association, entitled to the most deferential treatment by the courts, and have the complaint dismissed. Today with many more vital interrelations among social institutions, government, and the public, an accrediting agency would most likely be required to justify its actions in terms of arbitrariness, capriciousness, conflict of interest, free speech, due process, equal protection, etc. The technical complexity of these legal factors can be imposing, so much so that the intrinsic soundness of peer review can be lost in a flurry of sophisticated legal arguments, built around "the public interest." As educators, we have an innate confidence that peer review, which is the essential guardian of academic freedom, is solidly behind the general public well-being. It can come as a rude shock to have a court, not at all haphazardly, conclude otherwise.

As in medicine, the greatest calling in law is preventative care. We can ask, what might a concerned accrediting agency do, in advance, to minimize the legal risks it faces? Or, what might it do to set its affairs in order so it can put its best foot forward? Where have these new responsibilities come from? What do they portend for post-secondary accreditation in general? How can accrediting agencies be more accountable to the public without compromising the soundness and security of their services to their members? Most importantly, what can accrediting agencies do to preserve and protect their role as the academic community's primary means of self-regulation? These are difficult questions which only the most well-schooled legal researcher would attempt to answer.

In the person of Professor William Kaplin, we have a scholar deeply versed in accreditation, and no stranger to this series. In an earlier COPA monograph on government and accreditation, Professor Kaplin laid the foundation for the recent national debate regarding the linkage between accreditation and eligibility for federal funds. He is also widely recognized for his treatises on the law and higher education.

In a cogent analysis which will be valuable to both counsel and the practicing educator, Professor Kaplin charts the constellation of legal cases by which we can set our course. His illumination of the tensions between impartiality and expertise and his explanation of the characteristics of public representatives are required reading. Professor Kaplin provides us not only with a splendid analysis of the legal issues, but also with a realistic set of working guidelines for quasi-public bodies. His conviction, which we share, is that sincere, forthright

attention to public accountability will, in the long run, strengthen the autonomy of accrediting agencies and protect them from intrusion by the courts into their confidential affairs.

As the title suggests, the public interest is an elusive goal, somehow just beyond our reach. In our view, those who give honest attention of this timely and perceptive analysis will find that they now have within their grasp, perhaps for the first time, the important significance of the term, "the public interest."

Charles M. Chambers
General Counsel
The Council on Postsecondary Accreditation

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I. Introduction

There was a time when accreditation, like higher education, was a private or internal matter governed by the accreditors and educators themselves, unimpeded by public government. There was likewise a time when professional associations, whether in education, the health professions, or other fields claiming special expertise, operated relatively free from scrutiny by legislatures, courts, or other arms of government. But times have changed, and with changing times conceptions of law and public policy have also changed.

In recent history public interest and governmental involvement in education have been expanding. Similarly, the public's interest in professional matters and the operation of professional associations has increased, as has government's tendency to become involved with such concerns. Accreditation lies at the convergence of these two social movements. Being part of the educational process, accreditation has been affected by increased concern for educational matters; being a function performed by professional associations claiming special expertise, accreditation has also been affected by the shift in public and governmental attitudes toward these matters. These forces have changed public policy regarding accreditation and have affected the ways in which government, especially its judicial branches, has viewed questions concerning accreditation and the functioning of accrediting agencies.

This paper considers the evolution in the way courts have labeled or categorized accrediting agencies, and the legal and policy consequences of this evolution. Discussion will then focus on the "public interest" standard that is the core of these developments and on ways in which accrediting agencies can fulfill their legal responsibilities under this standard.

II. Legal Categories for Accreditation

The law generally characterizes organizations and associations into one of four basic categories: (1) "governmental," (2) "quasi-governmental," (3) "quasi-public,"[1] and (4) "private" or "non-public." Each category evidences a different approach to judicial review of included entities. Governmental entities receive the highest degree of judicial scrutiny; private entities receive the lowest — sometimes meaning no scrutiny at all. The other two types of entities lie between these extremes.

A governmental entity is one created and supported by law or public authority in order to serve governmental purposes. In other words, a governmental entity is an arm of either the federal government or a state or local government. Thus, federal administrative agencies such as the United States Department of Education are governmental entities, as are state and local administrative agencies such as school boards. Similarly, a state university or a community college would be a governmental entity. Governmental entities are clearly subject to federal and state constitutional limitations on their authority, such as a requirement that they follow due process of law. Governmental entities are also subject to the restraints of their authorizing or enabling legislation, restraints contained in administrative procedure, acts, and various other public law restraints embodied in statutes, ordinances, executive orders, and administrative regulations. In interpreting and applying this plethora of restraints, courts exercise a high level of scrutiny of governmental entities' actions, often resulting in a judicial invalidation of particular decisions and policies.

At the other end of the spectrum, the private entity is formed and operated for the purely private benefit of its owners or members. The private entity is neither created, directed or controlled by government, nor does it act for the government. Rather, private entities are designed to be autonomous, controlled only through voluntary arrangements of private persons or organizations in their private dealings with one another. Thus athletic clubs, social clubs, business and commercial groups, and fraternal organizations may all be considered to be private entities. A private entity is not subject to the federal or state constitutional limitations that bind governmental entities, nor is it subject to authorizing or enabling legislation or other public law strictures applicable to governmental entities.

[1] "Quasi" is a Latin phrase meaning as if, almost as it were, or analogous to. It "is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are intrinsic and material differences between them." BLACK'S LAW DICTIONARY, 4th ed. rev., 1968, p. 1410.

Typically removed from the public eye, and of little concern to government, private entities are little touched by public law. Courts thus have traditionally played a minimal role in ordering or limiting the affairs of private entities. While private law, such as the common law of contract and tort, does apply, it is often used by courts in a deferential fashion in order to protect private entities' autonomy.

Falling into neither the governmental nor the private category are entities which, though ostensibly private, are in the public eye or of concern to government. These entities may be either "quasi-governmental" or "quasi-public," depending upon the particular relationships they have with governmental agencies and the general public. In either case, the law lays a considerably heavier hand upon these entities than it does upon private entities.

A quasi-governmental entity is one which acts for or with the affirmative support of government, either federal, state, or local. When the action of an ostensibly private entity "may fairly be said to be that of the state" because "to some significant extent the state in any of its manifestations has been found to have become involved" with that entity, then the entity's action may be considered to be "state action."[2] When a private entity is found to be engaged in state action, it will be transformed in the law's eye into a quasi-governmental entity subject to restraints of the federal Constitution. Thus, to the extent that the entity's action is state action, it will be subject to the same constitutional limitations (although not other public law limitations) that would apply to governmental entities. The court's corresponding role is thereby enlarged and the degree of judicial scrutiny heightened.

The quasi-public entity, on the other hand, is not engaged in state action, and it is thus not subject to the restraints of the federal Constitution. Nevertheless, such an entity is considered to perform functions which are in some significant degree important to society as a whole. Thus, these entities do not exist for purely private aspects which lead courts to label these entities quasi-public and require that they operate "for the common good" or "in the public interest."[3] Although these requirements are based on judge-made common law rather than the federal Constitution, courts do sometimes look to constitutional (or statutory) principles as evidence of the public interest. This use of public law to inform the common law process, and the open-ended character of the public interest concept, combine to yield substantial judicial scrutiny of quasi-public entities.

The process of labeling legal entities may seem technical and theoretical, but it can have very practical effects on their operations. The choice of category can be determinative of the scrutiny courts will give to the entity's actions and the degree to which they will limit its discretion. The judiciary's characterization may also influence policy decisions about particular entities made by legislatures and administrative agencies.

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[2] *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

[3] *Doe v. Bridgetown Hosp. Ass'n*, 366 A.2d 641 (N.J. 1976).

The next four chapters examine the applicability of each legal category to accreditation by analyzing the judicial precedents on accreditation against a backdrop of related legal developments.

III. Accrediting Agencies as Governmental Entities

Occasionally state governments have conducted programs of evaluating higher education institutions which they have called "accrediting" or which others have recognized to be activities in the nature of accreditation. The primary example is the State of New York, where the Board of Regents has for many years evaluated and recognized colleges and universities within the state's borders. While New York does not specifically call its activities accreditation, the United States Department of Education does recognize the New York Board of Regents as a "nationally recognized accrediting agency" for New York institutions. Another example is the State of Indiana, whose Indiana Private School Accrediting Commission has "accredited" private higher educational institutions within that state.

Such examples of governmental accrediting activities are clearly the exception rather than the rule. Even as to these activities, there is considerable controversy over whether they actually constitute accreditation as that term is understood, and if they do, whether it is good policy for states to sponsor them. There is a generally accepted distinction between accreditation and *licensure* — a governmental regulatory scheme for granting authority to operate, award degrees, or use a collegiate name. Licensure is an appropriate, probably essential, state function, and many states engage in it. Accreditation is a qualitatively different process of peer and professional review which states engage in only to the extent previously noted.[4]

With these qualifications, it is clear that accreditation is not, and historically has not been, an activity conducted by states or local governments.[5] Nor does the federal government conduct accrediting activities. While it does officially "recognize" accrediting agencies,[6] it

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[4]POSTSECONDARY EDUCATION CONVENING AUTHORITY, IEL, APPROACHES TO STATE LICENSING OF PRIVATE DEGREE-GRANTING INSTITUTIONS (The George Washington University, 1975).

[5]W. SELDEN, ACCREDITATION: A STRUGGLE OVER STANDARDS IN HIGHER EDUCATION (Harper & Bros., N.Y., 1960).

[6]J. PROFFITT, "The Federal Connection for Accreditation," 50 *Journal of Higher Education* 145 (1979); cf. K. YOUNG, "Accreditation and the Office of Education," 60 *Educational Record* 212 (1979).

does not create or fund them and does not consider them to be governmental entities. As the U.S. Department of Education has noted:

> *One of the distinctive features of American Education is that the development and maintenance of educational standards are the responsibilities of* non-governmental, *voluntary accrediting associations . . . It is the policy of the Department of Education generally to support and encourage the various recognized voluntary accrediting associations in their role as the primary agents in the development and maintenance of educational standards in the United States.*[7]

IV. Accrediting Agencies as Private Entities

In organizational format, accrediting agencies are "non-profit," "voluntary" associations or corporations established under state law. Their purposes and powers are set forth in articles of incorporation or association and in by-laws, rules, and regulations which the agencies formulate and enforce. In this sense, accrediting agencies are part of a broad category of "private" entities which the law has traditionally treated with deference.

The first reported court case dealing with accreditation emphasizes the private character of accrediting agencies. In 1938, after the North Central Association had investigated its state agricultural college, North Dakota brought suit against NCA. The state alleged that the Association had threatened to withdraw the college's accreditation and requested a preliminary injunction against such action. The federal courts rejected the state's request and decided the case in favor of the accrediting agency in *North Dakota v. North Central Association of Colleges and Secondary Schools.*[8] Both the trial and appellate courts stated that the defendant association was "purely voluntary in character." Such organizations were to be treated deferentially and courts "should be hesitant to involve themselves in their internal affairs." According to the trial court:

> *In churches, lodges and all other like voluntary associations each person, on becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization, and courts will not interfere to control the enforcement of by-laws of such associations but*

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[7] U.S. DEPARTMENT OF EDUCATION, NATIONALLY RECOGNIZED ACCREDITING AGENCIES AND ASSOCIATIONS: CRITERIA AND PROCEDURES FOR LISTING BY THE U.S. SECRETARY OF EDUCATION AND CURRENT LISTING (cover inset) (1980).

[8] *State of North Dakota v. North Central Ass'n of Colleges and Secondary Schools*, 23 F. Supp. 694 (E.D. Ill.), *aff'd*, 99 F.2d 697 (7th Cir. 1938).

will leave them free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their own government.

The appellate court agreed:

The Association being purely voluntary is free to fix qualifications for membership; and to provide for termination of membership of institutions which do not meet the standards fixed by the Association. The constitution, by-laws, and rules of government of the Association measure the rights and duties of the members.

This 1938 case thus upholds the propositions that accrediting agencies are private (or purely private) entities; that holding and applying for membership are voluntary choices; that the law applicable to accrediting agencies is primarily that which the agency develops itself, by formulating and enforcing its own rules and regulations; and that courts should generally abstain from reviewing accrediting actions unless they violate the agency's own rules and thus breach the implied contract between the agency and its members.

In the next reported accreditation decision, *Parsons College* v. *North Central Association of Colleges and Secondary Schools,*[9] the court echoed the sentiments of the *North Dakota* opinions. The court described the defendant as a "voluntary association of educational institutions . . . chartered as a non-profit corporation under the laws of Illinois" and suggested that such entities should be treated deferentially. In a departure from the spirit of the *North Dakota* opinions, however, the *Parsons* court admitted that the "law governing actions of this kind is not wholly free of uncertainty." Citing recent cases dealing with medical associations and educational associations, this court suggested that a more probing standard of judicial review could apply. The court did not resolve its "conjecture" about applicable law, however, since it found that the association's actions would have been lawful even under a higher standard of review.

Thus, while *Parsons* is like *North Dakota* in viewing accrediting agencies as private entities which make their own law without interference by public authority, the case goes beyond *North Dakota* in suggesting and illustrating a less deferential form of judicial review which would make accrediting agencies less "private" in the law's eyes. In the latter respect, *Parsons College* foreshadowed events to come in later cases. An examination of these cases, in the next two chapters, reveals that the private entity category is no longer suitable for accreditation.

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[9] *Parsons College* v. *North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (1967).

V. Accrediting Agencies as Quasi-Governmental Entities

Courts have developed various approaches for determining whether ostensibly private action is "state action" or "governmental action" subject to the restraints of federal and state constitutions. Generally, the private action will be considered to be state action if the actor is engaged in a "public" or "governmental" function or if the government has lent substantial power, property, or prestige to the support of the private action. In the former situation, only functions which are "traditionally associated with sovereignty" and are "exclusively reserved to the state" will be considered public functions.[10] In the latter situation, the state must actually "foster" or "encourage" the particular private activity at issue or the state's involvement with the private entity must be so substantial as to "make the state a partner or joint venturer in the enterprise."[11] In either case, "the question of whether particular conduct is private, on the one hand, or amounts to state action on the other hand, frequently admits of no easy answer."[12] There is no "precise formula for recognition of state responsibility [for private actions] . . . . Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance."[13]

The character of accreditation and the relationships between government and accrediting agencies are such that both types of state action arguments may be made. Indeed, such arguments have been raised in a number of reported court decisions. The opinions reveal a trend from complete rejection of state action arguments to clear receptivity to such arguments in the accreditation context.

In the 1938 *North Dakota* case the court made only a brief comment disposing of the state action issues:

> *[I]t is vain to appeal to a constitutional bill of rights, for such bills of rights are intended to protect the citizen against oppression by the government, not to afford protection against one's own agreements.*[14]

The opinion in *Parsons College* is similar:

> *[T]he College draws no support from the commands of the federal Constitution. . . . By their terms, these constitutional guarantees control only the action of government. Designed to guard the individual against the overweening power of the state, they do not control the voluntary arrangements or*

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[10] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974).

[11] *Moose Lodge* v. *Irvis*, 407 U.S. 163, 176-77 (1972).

[12] *Id.* at 172.

[13] *Burton* v. *Wilmington Parking Auth.*, *supra* note 2, at 722.

[14] *State of North Dakota* v. *North Central Ass'n of Colleges and Secondary Schools*, *supra* note 8, at 700.

> *relations of private citizens in their private dealings with each other. Here there is no suggestion that the Association is an arm of government, making its acts the action of the state. With a corporate charter granted under general law, the Association stands on the same footing as any private corporation organized for profit or not. The fact that the acts of the Association in granting or denying accreditation may have some effect under governmental programs of assistance to students or colleges does not subject it to the constitutional limits applicable to government, any more than a private employer whose decision to hire or fire may affect the employee's eligibility for governmental unemployment compensations.*[15]

The next accreditation case, however, reflects a spirit distinctly different from that of *North Dakota* and *Parsons*. In *Marjorie Webster Junior College* v. *Middle States Association*,[16] the plaintiff relied extensively on the argument that the defendant association was engaged in state action. The plaintiff focused particularly on the relationship between accrediting agencies and the federal government created by the system for dispensing federal funds to colleges — the same factor considered and summarily rejected by the *Parsons* court. The trial court in *Marjorie Webster* disagreed with *Parsons* and accepted the plaintiff's argument:

> *[D]efendant acts in a quasi-governmental capacity by virtue of its role in the distribution of federal funds under the "aid to education statutes." Selection of the recipient schools is frequently dependent upon the accredited status of the applicant. Middle States and the other regionals are officially recognized by the United States Commissioner of Education who publishes a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution . . . The regional accrediting associations have operated as service agencies for the federal government in determining eligibility for funding.*[17]

In addition to this relationship between the federal government and accrediting agencies, the court also noted relationships with the states:

> *Middle States' function as an agency to identify institutions of quality is not limited to its relationship with the federal government. In states under its jurisdiction, it has been recognized as an agency to identify institutions of quality for purposes such as teacher certification, state loans, and state scholarships.*[18]

Imputing constitutional significance to these relations with state government as well as with the federal government, the court determined that "the defendant in performing its accreditation function is engaged in a quasi-governmental function, subjecting it to the

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[15] *Parsons College* v. *North Central Ass'n of Colleges and Secondary Schools*, *supra* note 9, at 70.

[16] *Marjorie Webster Junior College* v. *Middle States Ass'n*, 302 F. Supp. 459 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir. 1970).

[17] *Id.* at 470, 473.

[18] *Id.* at 478.

restraints of the Constitution." Finding that the defendant's refusal to consider the plaintiff for accreditation was "arbitrary, discriminatory, and unreasonable," the trial court concluded that Middle States' action violated the federal Constitution's due process clause.

The trial court's headline-making opinion, however, did not survive intact. The United States Court of Appeals for the District of Columbia Circuit overruled the trial court's decision and entered judgment for Middle States. To put the appellate decision in proper perspective, it is critical to note that the court did not disagree with the trial court's reasoning concerning state action. Rather, for purposes of its analysis, the appellate court "assume[d], without deciding, that either the nature of . . . [Middle States'] activities or the federal recognition which they are awarded renders them state action subject to the limitations of the Fifth Amendment [due process clause]."

The last in this line of accreditation cases is *Marlboro Corporation* v. *Association of Independent Colleges and Schools.*[19] The trial court unequivocally rejected the plaintiff's categories of the defendant's action as state action, asserting that "defendant association's ties with government are not sufficient to invest its actions with governmental character under *Burton* v *Wilmington Parking Authority.*" Although affirming the trial court's decision for the accrediting agency, the appellate court termed the state action issue a "close question." It did not decide the issue because "even assuming that constitutional due process applies, the present record does not persuade us that any of . . . [the school's] procedural rights have been violated." Although reserving official judgment, the appellate court did indicate its receptivity to the state action argument:

> *While it is true that there is no governmental participation in AICS, the Commission has actively sought and received the federal recognition that makes its grant of accreditation a prerequisite to federal program eligibility. It appears that if AICS or an agency like it did not perform the accreditation function, "government would soon step in to fill the void."*[20]

Thus the *Marlboro Corporation* case is ultimately in league with the *Marjorie Webster* decisions rather than the older *North Dakota* and *Parsons* cases.

In making its state action comment, the appellate court in *Marlboro Corporation* cited *Parish* v. *National Collegiate Athletic Association*[21] — the leading case in a line of state action cases involving the NCAA. As the court implied, *Parish* may also have applications to accreditation. In the NCAA cases, the courts emphasized that approximately half of the Association's members are public institutions. These public institutions, through payment of dues, provide the majority of the Association's capital and, through participation of their representatives in the Association's governing council, wield substantial influence in decision making and standard setting. This extensive involvement of public institutions in the

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[19] *Marlboro Corp.* v. *Ass'n of Independent Colleges and Schools*, 416 F. Supp. 958 (D. Mass. 1976), *aff'd*, 556 F.2d 78 (1st Cir. 1977).

[20] *Id.* 556 F.2d at 80.

[21] *Parish* v. *NCAA*, 506 F.2d 1028 (5th Cir. 1975).

affairs of a private association persuaded these courts that the NCAA's actions were state actions subject to the Constitution.

The state action analysis of the NCAA cases cannot blanketly be applied to all accrediting agencies. At most, it could apply only selectively, depending on careful analysis of membership, finances, and organizational structure. If analysis of a particular agency indicated public institutions exercised a clear balance of power within the agency generally, or with respect to the matter before the court, the NCAA cases would provide authority for yet another basis for finding state action.

Of the various state action precedents, only the first *Marjorie Webster* opinion directly holds an accrediting agency to be quasi-governmental. But other cases are sufficiently receptive to this approach that it must be taken seriously.[22] Pending further judicial developments, the quasi-governmental category must be considered a viable one for accreditation.

VI. Accrediting Agencies as Quasi-Public Entities

Although the quasi-public category has its roots in early English common law, in its modern form it is the newest of the four categories under consideration. Its leading progenitors are a 1944 labor union case from California, *James* v. *Marinship Corporation*[23] and a 1961 medical society case from New Jersey, *Falcone* v. *Middlesex County Medical Society*.[24] In *James* the court asserted that "where a union has . . . attained a monopoly of the supply of labor . . . such a union occupies a quasi-public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations." The *Falcone* court characterized a local medical society in similar fashion, emphasizing that "it is an association with which the public is highly concerned and which engages in activities vitally affecting the health and welfare of the people . . . [It] possesses,

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[22]In July of 1981, a federal district court in Chicago accepted the state action approach in a case against the accrediting agency for law schools, the American Bar Association. The court relied on the fact that many states require graduation from an ABA-approved school as a prerequisite to bar admission. In an oral opinion, the court ruled that "many states do in fact delegate that approval function to the ABA, [and] for perfectly proper and valid reasons, the ABA is fulfilling a state function." See "Bar Group Told Not to Use its Ban on Religious Bias," *The Chronicle of Higher Education*, p. 14, col. 4 (July 27, 1981).

[23]*James* v. *Marinship Corp.*, 155 P.2d 329 (Cal. 1944).

[24]*Falcone* v. *Middlesex County Medical Soc'y*, 170 A.2d 791 (N.J. 1961).

in fact, a virtual monopoly over the use of local hospital facilities . . . Public policy strongly dictates that this power should not be unbridled. . ."

Use of the quasi-public category depends on an analysis of the particular group's functions and their impact on society. As with the quasi-governmental category, the search is for "public" functions that affect the general "public." But unlike the quasi-governmental category, such functions need not be the traditional and exclusive prerogative of government; a broader and more flexible concept of "public" applies, as the *James* and *Falcone* cases illustrate.

Like the quasi-governmental label, the quasi-public label has been receptively considered by courts in recent accreditation cases. Use of this label was not contemplated in the *North Dakota* litigation of 1938, since the category was not yet sufficiently developed in modern law. By the time of the *Parsons* case in 1967, however, the quasi-public branch of law had begun to bloom. Although the *Parsons* court declined to embrace its principles as the governing law for the case, the litigation nevertheless represents a significant step toward application of this category to accrediting agencies. The opinion both recognizes some movement in the law away from the rule of judicial non-interference with private associations and illustrates the analysis which might apply to accrediting agencies were they considered to be quasi-public.

As with the quasi-governmental category, it is the third case in line, *Marjorie Webster*, which actually transplants the quasi-public theory into accrediting agency ground. The *Marjorie Webster* trial court mixes together quasi-governmental and quasi-public analysis, conceptually blurring the categories. But with some sorting out, it becomes clear that the trial court's opinion does strongly rely upon the quasi-public category:

> *Over the years Middle States . . . has become a powerful instrumentality which sets policies in an area of vital concern to the public. Accreditation . . . confers a significant competitive advantage on defendant's members as distinguished from non-members. In view of the great reliance placed on accreditation by the public and the government, these associations must assume responsibility not only to their membership but also to society.*[25]

The appellate court in *Marjorie Webster* alleviated the conceptual uncertainty in the trial court opinion by clearly separating the quasi-public and quasi-governmental analyses. In doing so, the appellate court opinion is more hesitant and particular in the way it applies the quasi-public category to accreditation.

While overruling the ultimate conclusion reached by the trial court through quasi-public analysis, the appellate court does not reject application of the category to accrediting agencies. To the contrary, it strongly supports the theory's viability but cautions that its "general propositions must not be allowed to obscure the specific relevant facts of each

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[25] *Marjorie Webster Junior College* v. *Middle States Ass'n, supra* note 16.

individual case. In particular, the extent to which [judicial] deference is due to the professional judgment of the association will vary both with the subject matter at issue and with the degree of harm resulting from the association's action."

Applying this tighter conceptualization of the quasi-public category, the appellate court concluded that the defendant's refusal to consider *Marjorie Webster's* application for accreditation was a reasonable action when measured by the standards derived from the quasi-public category.

Since *Marjorie Webster*, two other court cases have applied the quasi-public label to accrediting agencies and used this analysis as the primary means of dealing with accreditation questions. In *Rockland Institute* v. *Association of Independent Colleges and Schools*,[26] the court relied on both the *Falcone* and the *Marjorie Webster* decisions, implicitly labeling the defendant accrediting agency as "quasi-public." Using standards from those cases, the court held that the defendant acted lawfully in withdrawing Rockland's accreditation. In *Marlboro Corporation* v. *Association of Independent Colleges and Schools*,[27] the trial court held that "private associations like defendants are 'quasi-public' and must follow fair procedures reasonably related to their legitimate purposes." On appeal, the appellate court quoted this language of the trial court and, after lengthy analysis, concluded that the defendant's action complied with applicable common law standards. Thus both the *Rockland Institute* and *Marlboro Corporation* cases confirm the approach to accrediting agencies staked out in the *Marjorie Webster* litigation. Since *Rockland* and *Marlboro* are also the latest cases in this line, they provide the latest word on application of the quasi-public theory to accreditation.

In light of these legal trends, accrediting agencies can no longer be considered either truly "private" or truly "voluntary" associations. The societal importance of accreditation and its importance to individual institutions and programs have evolved to the point that accrediting agencies have become "quasi-public."

VII. The Best Category for Accreditation

Based on the above legal developments, some conclusions may be drawn about the legal categories appropriate for accreditation. It is clear that the first possible label, "governmental" entity, is generally inapplicable. Only a few governments sponsor activities which they or the U.S. Department of Education consider to be accreditation; and even

[26] *Rockland Institute* v. *Ass'n of Independent Colleges and Schools*, 412 F. Supp. 1015 (C.D. Cal. 1976).

[27] *Marlboro Corp.* v. *Ass'n of Independent Colleges and Schools*, *supra* note 19.

these activities are not recognized as genuine accreditation by much of the accrediting community. Nor is the "private" entity label a viable option. Once suitable, as illustrated by the *North Dakota* litigation, this traditional label does not fit the contemporary world of accreditation. It has been outrun by evolutionary changes in the role of higher education, societal reliance on accreditation, and governmental relationships with accrediting agencies.

The real choice, therefore, is between the "quasi-governmental" and "quasi-public" labels. The theories underlying both categories are supported by modern legal developments, and both categories have been used receptively in recent accreditation litigation. Courts have not yet been forced to choose between the two, nor is a clear judicial preference for one category over the other yet apparent. At present, therefore, either or both categories may apply to a particular accreditation case. An accrediting agency may assert a preference for one of these two categories; it may, in consultation with counsel, structure its activities to minimize the likelihood that courts would place it in the disfavored category; but it should not ignore either category or refuse to take both seriously.

In the short run, the co-existence of two legal models for accrediting agencies will not make their life unmanageable. To date courts have devised similar legal requirements under each model and, when courts have consulted both categories in the same case, the result has been the same under each category. The *Marjorie Webster* trial court, for instance, held in the plaintiff's favor under both the quasi-public and the quasi-governmental categories. Although the appellate court disagreed, it maintained consistency between categories by deciding for the defendants under both. In the *Marlboro Corporation* litigation, the appellate court considered both categories, indicating that the legal requirements and result would be the same under each: "whether the process is measured against constitutional or common law standards, current doctrine teaches that procedural fairness is a flexible concept, in which the nature of the controversy and the competing interests of the parties are considered on a case-by-case basis." Given this symmetry in legal doctrine, accrediting agencies at present can comply with their responsibilities under both categories in the same way and at the same time.

In the long run, however, the law cannot be expected to maintain this consistency. The emerging principles applicable to accreditation are still rough-hewn; the refinements to come are likely to uncover some dissonance between categories. New questions may arise which, on close analysis, yield a different answer under each category. In such circumstances courts — and other governmental bodies following their lead — may choose between categories. The accrediting community should continue to plan for that eventuality so it may facilitate a choice and other refinements in the law which best serve its and society's needs.

The quasi-public category will likely serve long-range educational and societal needs better than the quasi-governmental category. The quasi-governmental label covers a wide variety of legal entities and a myriad of problems unrelated to accreditation or education.

The constitutional requirements attached to this category (such as due process, equal protection, and free speech) can be complex and technical. The quasi-public category, in contrast, deals specifically with professional associations and their particular role in American society.[28] Its legal requirements are flexible and relatively free of technical doctrine.[29] Thus, under the quasi-public category, the law's contours can better be shaped to the special considerations prevailing when a court is asked to review the expert judgments of a professional association. As the more focused approach, the quasi-public theory has also accumulated a greater body of relevant experience than the quasi-governmental theory in accreditation cases as well as numerous cases dealing with other entities such as medical societies. This greater body of experience, combined with the greater adaptability to the special problems of professional associations, should make the quasi-public category more useful to courts, more understandable and workable for educators, and more responsive to changing societal needs.

An additional strength of the quasi-public category is the acceptance it has achieved from sources other than courts. The accrediting community itself and knowledgeable outsiders have been hospitable to a view of accreditation as a quasi-public function. In 1971-72, an independent commission conducted a Study of Accreditation in Selected Health Education Programs (SASHEP). Its final report, with numerous implementation recommendations, stated that the "perception of accreditation as a private activity" is "anachronistic" and that accreditation for specialized fields of study has "substantial public trust functions and responsibilities."[30] For a study published in 1973, Jerry W. Miller used the "Delphi" procedure to assemble the views of 100 persons selected for their recognized knowledge about accreditation. The group's predominant view was that "accreditation should serve no function which conflicts with the public interest" and should conduct its business essentially as a public trust.[31]

The same view of accreditation is expressed by The Council on Postsecondary Accreditation (COPA), the national nongovernmental monitoring body for accrediting agencies:

> *While accreditation is basically a private, voluntary process, accrediting decisions are used as a consideration in many formal actions – by government funding agencies, scholarship commissions, foundations, employers, counselors, and potential students. Accrediting bodies have, therefore, come to be viewed as quasi-public entities with certain responsibilities to the many groups which interact with the educational community.*[32]

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[28]W. KAPLIN, "Professional Power and Judicial Review: The Health Professions," 44 *Geo. Wash. L. Rev.* 710, 731-733 (1976).

[29]*Id.* at 742-745.

[30]SASHEP COMMISSION REPORT 5, 19, 27, 38-39 (Nat'l Comm'n on Accrediting, 1972).

[31]J. MILLER, ORGANIZATIONAL STRUCTURE OF NONGOVERNMENTAL POSTSECONDARY ACCREDITATION: RELATIONSHIP TO USES OF ACCREDITATION 109, 120-121, 123-125 (Nat'l Comm'n on Accrediting, 1973).

[32]THE COUNCIL ON POSTSECONDARY ACCREDITATION, THE BALANCE WHEEL FOR ACCREDITATION, 1 (1981).

COPA furthers this view of accreditation in its "Provisions and Procedures for Becoming Recognized as an Accrediting Agency for Postsecondary Educational Institutions or Programs." Part B of the Provisions, in particular, stresses the "public responsibility" of accrediting agencies and the need for "effective public representation" on accrediting bodies — themes which COPA elucidates in a supplementary policy statement, "Accreditation and the Public Interest."

A comparable position is taken by the U.S. Department of Education, the primary government agency concerned with accreditation. The preface to its "Criteria and Procedures for Recognition of Nationally Recognized Accrediting Agencies and Associations" characterizes accrediting agencies as "nongovernmental," "voluntary," and "private." But the Criteria themselves underscore the "public" responsibilities of accrediting agencies. Section 149.2, for instance, defines accrediting as a form of "public recognition" for an educational institution or program; and Section 149.6(b) requires that a recognized agency "take into account the rights, responsibilities, and interests of students, the general public, the academic, professional, or occupational fields involved, and institutions." Other provisions require that accrediting agencies be "responsive to the public interest" and that they include "representatives of the public" in their organizational structures.[33]

Thus the intrinsic value of the quasi-public theory and its greater use by courts in professional contexts, combined with the emphasis on accreditation's public responsibilities by leading persons and organizations, make the quasi-public category the "best" for accreditation.

VIII. Legal Responsibilities for Accreditation

If the quasi-public category is the best for accreditation, it is important to understand the legal standards applicable to this category and the legal responsibilities they impose on accrediting agencies. Given the current similarity between the standards courts have used under the quasi-public and quasi-governmental categories, an understanding of the former category will also help agencies deal with the latter, at least in the short run.

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[33] U.S. DEPARTMENT OF EDUCATION, *supra* note 7, at cover inset, 1, 5-7. The ED Criteria for Recognition have been evaluated — positively — in a study and report by the Educational Testing Service; see J. Warren, "Evaluation of OE Criteria for the Recognition of Accrediting and State Approval Agencies" (ETS, 1980) (Contract No. 300-77-0497, Office Of Program Evaluation, U.S. Department of Education).

James v. *Marinship Corporation*, the forerunner of modern precedents, established that quasi-public entities must not act "contrary to public policy."[34] The court identified a "public policy against racial discrimination" and held that the defendant, a closed shop union, had violated that policy by excluding the plaintiffs from union membership. The other leading forerunner, the *Falcone* case, also used a public policy standard, emphasizing that "public policy is the dominant factor in the molding and remodeling of common law principles to the high end that they soundly serve the public interest . . ."[35] According to *Falcone*, public policy requires that a quasi-public entity's "monopoly" power:

> *[S]hould be viewed judicially as a fiduciary power to be exercised in a reasonable and lawful manner for the advancement of the interests of the . . . profession and the public generally . . . When . . . its action has no relation to the . . . elevation of professional standards but runs strongly counter to the public policy of our State and the true interests of justice, it should and will be striken down.*[36]

In *Parsons College*, the first accreditation case to consider the quasi-public category, the plaintiff college argued that accrediting decisions must not be "contrary to rudimentary due process or grounded in arbitrariness." Although questioning its validity, the court did apply this standard. In *Marjorie Webster*, both trial and appellate courts were much less oblique. The trial court's opinion contains the most emphatic description to date of the standards applicable to accreditation:

> *[Accrediting] associations must assume responsibility not only to their membership but also to society . . . The regional accrediting associations . . . have an opportunity to provide new leadership in orienting their policies toward the broader welfare of society and the public interest . . . Public policy requires that . . . [the accrediting] power of the defendant must be exercised in a reasonable manner in the public interest.*[37]

The *Marjorie Webster* appellate court agreed generally with the trial court: "The standards set must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction." In applying that principle to the defendant accrediting agency, however, the appellate court was more circumspect than the trial court, emphasizing that "judicial review of appellant's standards should accord substantial deference to appellant's judgment regarding the ends that it serves and the means most appropriate to those ends." The appellate court would uphold an accrediting agency's decision unless, after according such deference, the decision can be said to be "an unreasonable means of seeking to reach the ends sought." If the issue concerns not substantive standards themselves but rather

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[34]Public Policy, like the parallel concept of "public interest," has not been specifically defined in the law but may be discovered by courts in constitutions, statutes, official governmental policies and regulations, the trend of prior judicial precedents, and sometimes by resort to history, philosophy, or social science. See *James* v. *Marinship Corp.*, *supra* note 23, at 335.

[35]*Falcone* v. *Middlesex County Medical Soc'y*, *supra* note 24, at 795.

[36]*Id.* at 799-800.

[37]*Marjorie Webster Junior College* v. *Middle States Ass'n*, *supra* note 16, 302 F. Supp. at 470, 478.

"the fairness of the procedures by which the challenged determination was reached, less deference may be due professional judgment."

The last two accreditation cases, *Rockland Institute* and *Marlboro Corporation*, both deal with procedural requirements — the other side of the substance/procedure dichotomy set out in *Marjorie Webster*. The *Rockland* case focused on the most basic requirement: the agency must have "followed its own established procedures." The *Marlboro* case added a second, qualitative, requirement: a quasi-public entity must have "fair procedures reasonably related to . . . [its] legitimate purposes." Thus, an accrediting agency has a legal responsibility, not only to apply its own procedures in making decisions, but also to assure that those procedures are "fair."[38]

Rockland also includes the requirement that an agency's decision must not be "arbitrary or unreasonable." The court's opinion relies on an important gauge of reasonableness: the decision must be "supported by substantial evidence and reasonably related to the legitimate professional purposes of the association." The court extracted this standard from an earlier medical society case which explained it as a "just cause" requirement. The opinion in this case, *Blende* v. *Maricopa County Medical Society*,[39] adds further gloss to the reasonableness standard:

> *The judicial process involved in determining such a standard of reasonableness is essentially one of balancing individual, group, and public interests . . . When examining the justification for . . . [a particular action], the court should consider several factors: the social value of the goal of the . . . [association's] action; the appropriateness of the . . . [association] as a means for achieving the goal; and the reasonableness of this particular action of the [association] in relation to the goal.*[40]

The various standards suggested in these cases may seem vague and cryptic. Concepts such as "reasonableness" and "fairness" tend to dangle enticingly out of reach as one attempts to discern their meaning in concrete situations. Different cases, moreover, speak to different aspects of accrediting agencies' legal responsibilities. Thus no one standard or case, standing alone, provides a clear or complete picture. To develop such a picture, all the standards and cases must be consulted and put within the framework of the legal process. What image then emerges, and how can accrediting agencies be guided by it in the workaday world?

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[38] See W. KAPLIN, *supra* note 28, at 746-750.

[39] *Blende* v. *Maricopa County Medical Soc'y*, 393 P.2d 926 (Ariz. 1964).

[40] *Id.* at 930.

IX. Fulfilling Legal Responsibilities: The Public Interest Concept

Judicial opinions seldom contain all the guidance one might wish to find there. Rather than "legislating" such specifics, courts often leave a range of discretion in which affected entities may decide for themselves how best to fulfill judicial mandates. That is what has happened in the quasi-public entity cases. Thus such entities may themselves give substance to the concepts developed by the courts. Governmental agencies may also have a role. In the case of accreditation, COPA has devised "Provisions for Recognition" as an accrediting agency, "Interpretive Guidelines" which further clarify the recognition provisions, and the policy statement "Accreditation and the Public Interest." The U.S. Department of Education publishes its "Criteria for Nationally Recognized Accrediting Agencies." In addition, the SASHEP Study Commission developed an important statement of "Basic Policies for Accreditation" pertaining to all of postsecondary accreditation.[41] These sources can be valuable guides for accrediting agencies as they determine how best to fulfill their legal responsibilities as quasi-public entities.

Moreover, the court decisions, taken together, do evince a new spirit concerning accreditation and its responsibilities which can be an important guidepost in complying with legal requirements. In particular, the concept of "public interest," which often appears in court opinions and has been adopted in both COPA and Department of Education pronouncements, can be a critical touchstone.

A. Defining the Public Interest

At first glance, "public interest" may be the most elusive of all the standards employed by courts. What is the public interest? Under what circumstances is a particular action "contrary to" the public interest? These questions are theoretical and philosophical, but some answers to them, even if incomplete, will enhance the usefulness of the public interest standard as the primary guidepost for accrediting agencies.

The term public interest is frequently used in the law and appears in both statutes and court decisions. In cases like *Falcone*, public interest and "public policy" are used interchangeably. Courts have often explored the term but have never succeeded in developing a detailed definition. According to the courts, "public interest means more than mere public curiosity. To be a matter involving public interest, something must be involved in which the public, the community at large, has an interest or a right which may be

[41] SASHEP, *supra* note 30, at 17-29.

affected."[42] Public interest in the law, then, is "distinguished from private or personal [interest]," with the public interest being one "of, pertaining to, or affecting the people at large or the community."[43] Thus, an activity may become "clothed with a public interest when . . . [done] in a manner to make it of public consequence and affect the community at large."[44]

The public interest is not an ideal; it is based on "that which the community wants" rather than "that which an ideal community ought to want."[45] Nor is public interest a static concept. It expand(s) "with the growing complexity and integration of society."[46] "Plainly circumstances may so change in time or so differ in space, as to clothe with . . . [a public interest] what at other times or in other places would be a matter of purely private concern."[47]

This general definition is consistent with the court's use of public interest in the accrediting cases. Although the accrediting cases do not tailor the definition to fit accreditation specifically, useful attempts have been made in other quarters. In his study on *Organizational Structure of Non-Governmental Postsecondary Accreditation*, Jerry W. Miller defines public interest as "the community of societal interests held by the public in general, which may be congruent with but which tends to transcend the economic, personal, and professional interests of accrediting agencies and associations or of any other private group or individual in society."[48] In its "Policy Statement on Accreditation and the Public Interest," COPA defines public interest as "the interest of students and parents and the public generally as purchaser, supporter, and consumer of educational services." In his paper on *Accreditation and the Public Interest*[49], William K. Selden defines public interest simply as "the welfare of society," which he distinguishes from "the economic, professional or social benefit" of the institutions and professions which control accrediting activities.

Under these definitions, an action would be "contrary to" the public interest if it supported the personal or pecuniary interests of individuals or organizations at the expense of the broader interests of society. Or, to borrow again from a court decision, an entity would act contrary to the public interest if it failed to assume "an affirmative obligation" to the public and "to be reasonable in dealing" with public needs.[50] The goal is not that the

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[42] *State* v. *North Dakota Hosp. Serv. Ass'n*, 106 N.W.2d 545, 547 (N.D. 1960).

[43] *Farrell* v. *New York Evening Post*, 3 N.Y.S.2d 1018, 1021 (1938).

[44] *Munn* v. *Illinois*, 94 U.S. 113, 126 (1877).

[45] *Bartron* v. *Codington County*, 2 N.W.2d 337, 343 (S. Dak. 1942), citing P. Winfield, "Public Policy in the English Common Law," 42 *Harvard L. Rev.* 76, 99-100 (1928).

[46] *Hogue* v. *Housing Auth.*, 144 S.W.2d 49, 56 (1940).

[47] *Block* v. *Hirsch*, 256 U.S. 135, 155 (1921).

[48] J. MILLER, *supra* note 31, at 7.

[49] W. SELDEN, ACCREDITATION AND THE PUBLIC INTEREST 8 (COPA, 1976).

[50] *Chase-Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 536 (1923).

quasi-public entity ignore its own legitimate needs or those of its members; rather, the goal is that the entity reconcile these needs with broader societal needs, giving predominance to the latter if there is a conflict.

B. Promoting the Public Interest

If the public interest, so defined, is accreditation's guidepost, it remains to be determined how accrediting agencies can best promote the public interest rather than narrower interests which may be implicated in accreditation decisions. One answer to this question can be obtained by consulting the following sources: the COPA provisions, guidelines, and policy statements, the U.S. Department of Education criteria, and the SASHEP statement of basic policies. Particularly important are Part B of the COPA provisions and guidelines, dealing with "public responsibility;" COPA's policy statement on "the public interest;" section 149.6(b) of the ED criteria dealing with "Responsibility;" and principles I(A) and (B), II(C) and (F), III(A) and (B), and V(A) in the SASHEP statement, dealing with accreditation's societal purposes and their implementation.

A deeper answer to the question, however, requires exploration of four interrelated concepts critical to accreditation's future: (1) Autonomy, (2) Impartiality, (3) Expertise, and (4) Public Representation.

Autonomy. Accrediting agencies should be free from restraints which may affect their freedom or capacity to make accrediting decisions. To attain such autonomy, the accrediting body must operate independent of political or economic influences either within or outside the organization which sponsors the accrediting activity. Thus the accrediting body should not be obligated to, nor should its decisions on particular schools or programs be reviewed by, any other body having political or economic goals that may conflict with the educational goals of accreditation. Were an accrediting body structured to represent the interests of member institutions, the sponsoring profession, or some other particular interest, such an arrangement could skew its decision-making process in favor of those competing narrower interests to the detriment of the public interest.

Impartiality. In their individual capacities, members of accrediting agencies should be free from any personal or pecuniary interest in the outcome of accrediting decisions. Like the lack of autonomy, "conflicts of interest" on the part of individual members may also restrain free choice and tilt accreditation decisions in favor of narrower competing interests at the expense of the public interest.

"Conflict of interest" has been defined in the law as "a situation in which regard for one duty tends to lead to disregard of another,"[51] and as "a clash between public interest and the private pecuniary interest of the individual concerned."[52] Both constitutional due process and common law notions of fairness condemn the existence of such conflicts because they tend to undermine the decisionmaker's impartiality.

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[51] *U.S. v. Miller*, 463 F.2d 600, 602 (1st Cir. 1972).

[52] *Gardner v. Nashville Housing Auth.*, 514 F.2d 38, 41 (6th Cir. 1975).

This problem was discussed in one of the accreditation cases — *Marlboro Corporation* v. *Association of Independent Colleges and Schools* — in which the defendant had denied the plaintiff's application for renewal of accreditation. The plaintiff school charged that the chairman of the accrediting commission was also the president of a school in direct competition with the plaintiff which would "fall heir to" its business if accreditation were denied. Thus, the school contended, the chairman had a direct pecuniary interest in the outcome of the proceeding, and this apparent impropriety rendered the proceeding unlawful. Although the court called this question "troublesome," it held that the school had not shown "sufficient actual or apparent impropriety." The court stressed that the individual in question "took no part in the discussion or vote," and though he was present at the proceeding, he did not "chair or participate" in it.

Thus good policy suggests, and the law requires, that accrediting agency members be impartial decisionmakers free from actual or apparent conflicts of interest. This impartiality is the second ingredient in the mix assuring that accrediting agencies are responsive to the public interest. Combined with the first ingredient, autonomy, it creates an atmosphere for fair and constructive accreditation decision making. But autonomy and impartiality only help to prevent *bad* decisions; they do not guarantee *good* ones. In this sense, they are like a vacuum that needs to be filled: Other ingredients must be added to facilitate *good* decision making. The ingredients are: (1) expertise, and (2) public representation.

Expertise. In selecting the members of the accrediting body, in training them, and in providing support services to them, accrediting agencies should bring relevant expertise to bear on the accreditation process. Four kinds of expertise are important: educational expertise, expertise in the professional or occupational discipline being accredited, expertise in disciplines functionally related to the one being accredited, and expertise of the generalist — the expert at weaving together the separate views of the specialists.

In the real world, this goal of applying expertise exists in tension with the goals of autonomy and impartiality. Persons with the greatest expertise are likely to be involved in other educational or professional pursuits which inhibit their independence. For instance, persons with expertise in education or in the professional discipline being evaluated may be in competition with the institutions or programs they are judging. Such experts may also be involved in or affected by turf conflicts among professions or subgroups within a particular profession, or they may have other professional interests or obligations which limit their impartiality or the accrediting body's autonomy. Thus, carried to their extremes, autonomy and impartiality could undermine achievement of the goal of maximizing expert input into accrediting decisions. The goal of expertise must therefore be balanced against the other goals of autonomy and impartiality, with the realization that real world practicalities prohibit complete fulfillment of all three goals. If accrediting agency members are to be experts, most of them, at least, cannot be completely free of every appearance of conflict of interest. The greatest evil to avoid is the situation where the decision to be made

may "directly or substantially affect the institution or program with which . . . [the accrediting agency member] is associated or its competitive position with a neighboring institution or program under review."[53]

Public Representation. Perhaps the major technique for enhancing sensitivity to the public interest in accreditation is to include public representatives on the accrediting body. The U.S. Department of Education's recognition criteria define such persons as "representatives who are laymen in the sense that they are not educators in, or members of, the profession for which the students are being prepared, nor in any way are directly related to the institutions or programs being evaluated." COPA's "Policy Statement on Accreditation and the Public Interest" includes a lengthier definition which emphasizes that a public representative should be "a person with an informed, broad-gauged community point of view." Miller and Selden both include helpful definitions and discussions of public representatives in their studies.[54]

Broad-based public representation helps ensure the autonomy of the accrediting commission and the impartiality of its members by inserting into the process persons representative of broader interests, further removed from possible conflicts. Thus, public representatives can directly enhance fulfillment of the first two goals for accrediting discussed above. In addition, public representatives can enhance the third goal by bringing to the accrediting process what can be considered a fifth type of relevant expertise: the expert sense of the societal interests which are implicated in accreditation decision making. It would be short-sighted, however, to ignore the other four types of expertise in selecting public representatives. Such persons may also have some form of educational expertise in instruction, administration, or measurement and evaluation. They may have expertise in some discipline which is functionally related to the one whose programs are being accredited, or they may have the expertise of the generalist and be particularly adept at weaving together the various views expressed by the accrediting body. In order to encourage selection of representatives with these additional dimensions of expertise, neither the selection process nor the qualification requirements should be so preoccupied with the first two goals (autonomy and impartiality) that selection of expert public representatives becomes improbable.

It is the ability to procure these four ingredients to accreditation decision making, and to accommodate the potential conflicts in procuring all four, that will ultimately determine whether accrediting agencies indeed make decisions representing the public interest. It is through successful procurement and accommodation that public confidence in accreditation can be achieved and the public interest in accreditation can be protected.

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[53]THE COUNCIL ON POSTSECONDARY ACCREDITATION, POLICY STATEMENT ON ACCREDITATION AND THE PUBLIC INTEREST 3 (1980).

[54]Miller, *supra* note 31, at 8, 51-56, 138-139; and Selden, *supra* note 49, at 19-24.

X. Conclusion

In law as in politics, labeling can create overbroad generalizations and distract attention from more important questions. This is not the case, however, with the body of law which categorizes accrediting agencies. Due to evolutionary developments in both accreditation and law, the labeling question has become critical. The labels serve to clarify the legal responsibilities of accrediting agencies and provide standards to guide accreditation decision making. The label a court chooses establishes its fundamental orientation toward the entity before it. Often the orientation of legislatures and administrative agencies will be influenced by the course taken by the judiciary. The label which an agency applies to itself will also affect its view of itself and its work.

In earlier times, accrediting agencies wore the label "private." Courts and government agencies accepted this label. By the 1970's, both attitudes and labels had changed. A consensus has now appeared that accrediting agencies and the interests they affect are more public than private. This view of accreditation can be accommodated by both the "quasi-governmental" and "quasi-public" categories. There are strong arguments for applying both categories to accreditation. The latter category, however, is more adaptable to the particular functions of accrediting agencies and more accepted by the accrediting community and government agencies. In the long run, the education world and society will be best served by viewing accrediting agencies, for both legal and policy purposes, as quasi-public entities.

The quasi-public category of law focuses attention on the public service aspects of included entities. It provides a set of variously defined standards to guide courts in reviewing decisions of accrediting agencies and to guide accrediting officials and public policymakers in fulfilling accreditation's responsibilities to the public. This category also establishes the fundamental goal for accrediting agencies to pursue: serving the "public interest." This concept, though elusive, is the key to understanding the quasi-public category. Broken into its four critical ingredients, autonomy, impartiality, expertise, and public representation, the public interest concept will serve as the fundamental guidepost for marking accreditation's place in the educational world and the broader American society.

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About the Author

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